

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re: :
: Docket #14md2542
KEURING GREEN MOUNTAIN SINGLE- : 1:14-md-02542-VSB-SLC
SERVE COFFEE ANTITRUST LITIGATION :
: New York, New York
: April 21, 2020
----- :

PROCEEDINGS BEFORE
THE HONORABLE SARAH L. CAVE
UNITED STATES DISTRICT COURT MAGISTRATE JUDGE

APPEARANCES:

For Plaintiff - WINSTON & STRAWN LLP
Treehouse Foods, Inc.: BY: KELLI LANSKI, ESQ.
JOHN ROSENTHAL, ESQ.
200 Park Avenue
New York, New York 10166

For Defendant - CLEARY GOTTlieb STEEN & HAMILTON LLP
Keurig Green Mountain BY: JOSEPH KAY, ESQ.
Inc.: CHRISTIAN J. MAHONEY, ESQ.
One Liberty Plaza
New York, New York 10006

Transcription Service: Carole Ludwig, *Transcription Services*
155 East Fourth Street #3C
New York, New York 10009
Phone: (212) 420-0771
Email: Transcription420@aol.com

Proceedings recorded by electronic sound recording;
Transcript produced by transcription service.

INDEXE X A M I N A T I O N S

<u>Witness</u>	<u>Direct</u>	<u>Cross</u>	<u>Re- Direct</u>	<u>Re- Cross</u>	<u>Court</u>
----------------	---------------	--------------	-----------------------	----------------------	--------------

None

E X H I B I T S

<u>Exhibit Number</u>	<u>Description</u>	<u>ID</u>	<u>In</u>	<u>Voir Dire</u>
---------------------------	--------------------	-----------	-----------	----------------------

None

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

THE COURT: Hi, good morning, this is
Magistrate Judge Cave, this is a conference In re:
Keurig Green Mountain Single-Serve Coffee Antitrust
Litigation, case number 14md2542, may I have the
appearances, please.

MR. JOSEPH KAY: Good morning, Your Honor, you
have Joseph Kay on the line from Cleary, Gottlieb for
Keurig, I'm planning on arguing today. We have a few
other lawyers on the line from Cleary including CJ
Mahoney who submitted the declaration as the senior
attorney at Cleary focusing on e-discovery.

THE COURT: Very good, thank you. And who do
we have for Treehouse?

MS. KELLI LANSKI: Hi, good morning, Your
Honor, this is Kelli Lanski of Winston & Strawn, I'll be
arguing for the Treehouse plaintiff. My colleague, John
Rosenthal, who filed a declaration is planning to join
in. John, I'm not sure if you're on the line yet?

MR. JOHN ROSENTHAL: Good morning, Your Honor,
John Rosenthal.

THE COURT: Okay, good morning. And for those
who are not speaking, if you would be so kind as to mute
your line so that we can minimize the feedback and
improve the quality of the recording, please. I'll also

1
2 note, this is a housekeeping matter, we are recording
3 this call and it will be saved for five days only,
4 that's all the storage space that we have on the call
5 recording server. So if the parties wish to have this
6 recording saved so that it can be transcribed later by a
7 court reporter, you need to notify chambers in writing
8 by an email to the chambers email within five days of
9 today's call, so by the 26th. Okay, Mr. Kay, would you
10 like to start?

11 MR. KAY: Yes, thanks, Your Honor. So there are
12 really two main disputes between the parties. The
13 first, the parties disagree on whether the order
14 requires a family custodian other field. We think the
15 text of the order, the parties' course of conduct and
16 industry practice show it require a family level field
17 reflecting deduplicated documents. And second, the
18 parties disagree over whether Nuix can generate family
19 level metadata for the custodian other field.

20 Mr. Mahoney and Mr. Marshall, who's a third
21 party working for the e-discovery vendor at Encoura
22 (phonetic), both say that the required metadata can be
23 provided with minimal burden imposed on Treehouse and
24 Treehouse does not directly dispute this. Treehouse
25 says that it does not know how to safely generate the

1
2 data and does not claim to have called this vendor or
3 tried.

4 But before turning to those issues I want to
5 address why Keurig needs the correct metadata and why
6 it's important that Treehouse be ordered to produce the
7 metadata now. And in short, Keurig has concerns that
8 it's missing documents from Treehouse's productions.
9 Keurig has raised issues with Treehouse for many months
10 and Treehouse has denied any issues, including by citing
11 its noncompliant custodian other metadata as evidence
12 that it has made large productions from each of the
13 custodians who Keurig has identified. Keurig's time to
14 resolve these disputes within fact discovery is coming
15 to a close and the parties need correct metadata to
16 resolve these ongoing disputes.

17 Just to highlight a few of the discovery
18 disputes that Treehouse's incorrect metadata has
19 hindered resolution of, Keurig's concerned that
20 Treehouse's productions from custodian Tom Rathers'
21 files are incomplete because Rathers was not placed
22 under a litigation hold before he left the company in
23 late 2014. Treehouse produced only 236 unique documents
24 from his files, despite the fact that Mr. Rathers worked
25 at Treehouse on single-serve for more than four years

during the discovery period. Treehouse's primary response has been that it actually produced 20,000 documents from his files which is not true. Treehouse's count relied on the custodian other metadata to inflate the production total by multiple times. We provided an example in our motion of a blank image file Mr. Rathers received 2 copies of but was listed as a custodian on nearly 4,000 times. We had to do extensive manual work to figure this out because Treehouse had not produced the correct custodian of his information and was denying that there were any concerns with Rathers' production. Keurig included the relevant correspondence on this as Exhibit 2 to its April 7th letter.

Keurig is also concerned that 10 other Treehouse custodians did not receive litigation holds until 2017 or 2018, which is several years after Treehouse filed this lawsuit, even though the employees held key roles in Treehouse's single-serve coffee business much earlier than their hold dates. Keurig compared emails produced or deduplicated versus emails sent to or from the particular custodian, showing in some cases that custodial files contained less than 10 percent of relevant emails known to exist from other sources. This is evidence of potential significant data

1
2 loss. Treehouse refused to respond because it said
3 Keurig supposedly ignored its custodian other metadata.
4 Keurig includes this correspondence as Exhibit 3 and 4
5 to its letter. The dispute regarding these 10
6 custodians missing documents, like our disagreement with
7 Treehouse regarding Mr. Rathers' documents, is still
8 pending.

9 Keurig also conducted a time intensive analysis
10 of Treehouse's productions through Craig Lemieux, who is
11 a senior executive at Treehouse and a witness on
12 Treehouse's initial disclosures. Keurig learned that
13 Treehouse produced about 660 emails excluding families
14 from Mr. Lemieux' files between 2009 and 2013, even
15 though other files show Mr. Lemieux' center received at
16 least 18 times as many emails in the same time period.
17 Treehouse claimed that Keurig's numbers were wrong and
18 that it produced over 100,000 documents from Mr.
19 Lemieux' files in total. Treehouse's number again relies
20 on the inflated custodian other data, including one
21 Excel attachment Mr. Lemieux received approximately 560
22 copies of but that lists him as the custodian other on
23 more than 23,000 copies. Keurig includes this
24 correspondence as Exhibit 5 to the letter. Treehouse's
25 improper custodian other data is again masking problems

1
2 with its production in posing substantial burden on
3 Keurig and impeding resolution of this pending dispute.

4 As another example, Your Honor, in February of
5 this year Keurig deposed Adam Spratlin, a key Treehouse
6 witness who Treehouse did not place under a litigation
7 hold until 2017, even though Treehouse quoted one of Mr.
8 Spratlin's emails in its 2014 complaint. Keurig sent a
9 letter to Treehouse that showed Mr. Spratlin's emails
10 and very few sent emails. This was consistent with Mr.
11 Spratlin's testimony that he regularly deleted his sent
12 emails before receiving a litigation hold in 2017.

13 Treehouse admitted last week that it had not produced
14 responsive emails from Mr. Spratlin's emails from a
15 particular source because of an unspecified technical
16 issue. Given this and Mr. Spratlin's testimony, this is
17 another ongoing dispute about the adequacy of
18 Treehouse's preservation and collection efforts.

19 Keurig believes other Treehouse custodians have
20 likely been affected by similar preservation and
21 production problems, but it is extremely difficult and
22 inefficient to identify these problems without compliant
23 custodian other metadata. Keurig needs the data now in
24 order to determine if any other problems have been
25 masked and to try to get to the bottom of any production

1
2 problems promptly. Treehouse has not --

3 THE COURT: Mr. Kay, can I just pause you
4 there, so how is the additional data going to help you
5 resolve the disputes? In other words, what, it seems to
6 me like you are already suspicious of a number of the
7 custodians that, of the sufficiency of Treehouse's
8 production as to a number of custodians, so what is the
9 metadata, how is the metadata going to resolve that?

10 MR. KAY: Yes, Your Honor, and for a couple of
11 reasons. The first is that while Keurig has tried to
12 provide the Court and Treehouse estimates of the numbers
13 of documents produced from Treehouse custodians, they're
14 just estimates and it's impossible to actually come up
15 with accurate counts of the numbers of files produced
16 from particular Treehouse custodians until Treehouse
17 produces compliant metadata, you know.

18 And the second thing, as a practical matter,
19 and Keurig's been raising these issues with Treehouse
20 now for months and Keurig really can't bring Treehouse
21 to the table on the issues. In response now to multiple
22 correspondence, the parties have largely disagreed on
23 the methodology for determining the number of documents
24 produced from particular custodians which, in Keurig's
25 view, under the ESI order should be easy to calculate

1

10

2 and not a number that should be in dispute, because the
3 custodian other field combined with the custodian field
4 should provide it.

5 THE COURT: Well my question though is even if
6 you have the metadata, you are still going to, aren't
7 you still going to have a problem with what Treehouse
8 has produced? So I'm just struggling with why you don't
9 already have enough information to make whatever
10 argument, whether you're contemplating sanctions down
11 the road or whatever it is, I just, I don't see how it
12 makes a material difference in whatever position it is
13 you're taking as to or planning to take as to the
14 sufficiency of Treehouse's production.

15 MR. KAY: Your Honor, in response to any motion
16 that we make down the road, just like in response to the
17 letters that we've sent Treehouse, and Treehouse might
18 raise as a defense that it produced X number of
19 documents, for example, with respect to Mr. Rathers that
20 they produced 20,000 documents and that there was no
21 prejudice to Keurig. And we don't think that number
22 that they provide will be accurate, and so, you know,
23 there's an issue there. And the other problem is that
24 the field, itself, you know, may mask additional, well
25 with respect to the issues before the Court, they may

1

11

2 mask additional problems. Keurig, I understand, has
3 come up with estimates with respect to particular
4 custodians, but we can't eliminate all false hits that
5 the numbers, you know, in Treehouse's favor with respect
6 to, you know, all custodians because of these issues.
7 And so there are, at least with respect to live issues,
8 potentially even greater prejudice to Keurig than
9 Treehouse's numbers identify.

10

They've also used these numbers in opposition
11 to other requests that Keurig has actually made. For
12 example, with respect to the Petski motion, they
13 represented that Petski's files weren't necessary
14 because they had produced some other custodians. And we
15 think that those numbers, we cited the numbers from Mr.
16 Corona were inflated, that number we think was inflated
17 through time. So there's general just confusion about
18 these numbers as a result of Treehouse's noncompliance
19 that is a distraction in ongoing discussions about these
20 issues.

21

THE COURT: Were you about to move to the Nuix
22 issue or do you have more on the first point?

23

MR. KAY: Your Honor, well I can move onto the
24 Nuix issue if Your Honor would like. I was planning on
25 discussing the order next.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

THE COURT: Okay, that's fine, I wanted to, before we get to the technicalities of Nuix I want to hear from Treehouse, so why don't you go through your arguments about the order and then I'll pause and hear from Ms. Lanski before we go into the Nuix capabilities. So please go ahead with respect to your arguments about the order.

MR. KAY: Okay. And with respect to the order, Keurig believes the text in section 9 of the order is clear, it instructs Treehouse to produce a custodian other field reflecting all custodians who were in possession of the deduplicated documents. The phrase deduplicated document can only refer to a family level duplicate because deduplicating is defined on the family level in the order which Treehouse concedes. Treehouse tries to rewrite this word as if it says duplicates, but that's not what the order says, and the data Treehouse provided elsewhere already provides superior data on where duplicates of particular documents relied.

THE COURT: Mr. Kay, which section do you say describing documents at the family level, is that 9B?

MR. KAY: Yeah, section 9B.

THE COURT: Your Honor argument is that 9B means that, deduplicated document means, refers to

1

13

2 having been deduplicated at the family level?

3

MR. KAY: Yes, Your Honor.

4

5 THE COURT: Okay, sorry I interrupted you, go ahead.

6

7 MR. KAY: Second, Keurig's interpretation also
8 is supported by the parties' course of conduct.
9 Treehouse, as I mentioned, treated the custodian other
10 field as representing the total number of documents
11 produced from a particular custodian. Treehouse claimed
12 that Mr. Rathers, over 20,000 documents have Mr. Rathers
13 as a custodian counting the number of documents reported
14 in the custodian other field. The only justification for
15 Treehouse using the custodian other field as a proxy for
16 total number of documents produced from a particular
17 custodian is that it believes that the field reflected
18 the total number of documents from a particular
19 custodian's files. There is no reason why 4,000 copies
20 that Mr. Rathers never received should be considered
21 documents produced from him and indeed they were not,
22 and Treehouse does not offer any explanation for its
23 prior misleading representation, even though Keurig
24 cited this example and others in its motion.

24

25 I also note, Your Honor, that Keurig populated
its field the way that its saying Treehouse should

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

populate the field. And while Keurig hasn't spoken or hasn't needed to speak with the other plaintiffs about the field, we believe that both McLane and the other competitor plaintiff, JBR, populated their field correctly.

And the third point that supports Keurig's view here is that Mr. Mahoney and Mr. Marshall each submitted declarations referring to industry standard to populate a custodian other field on a family level, Mr. Marshall agrees with Keurig and Mr. Mahoney that it can generate a proper field. Mr. Marshall explained that the field should be populated to match deduplication because this provides the receiving party information on how the records were stored in the ordinary course. And in addition to the Encoura declaration from Mr. Marshall, Mr. Mahoney communicated with Nuix about the subject as he described in his declaration and Nuix confirmed -- Your Honor, actually I think you had mentioned that you wanted to turn it over to Treehouse --

THE COURT: Yes, before getting into that, yes, into the Nuix.

MR. KAY: So I'm happy to pause unless you have questions.

THE COURT: I don't right now, but I may after

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

Ms. Lanski speaks, but I think it's helpful if we just hold off on the Nuix discussion for now. So Ms. Lanski, can you please respond to Mr. Kay's argument.

MS. LANSKI: Yes, I'm happy to, thank you, Your Honor. So both today and in its filing, Keurig has chosen to focus a lot of the time on making what amounts to be spoliation type arguments to the Court. And not only is this not the appropriate time for that because there is a briefing scheduled for spoliation, but I think it must be acknowledged that Keurig's efforts are only coming on the heels of plaintiffs' identification of very serious preservation failures by Keurig.

Keurig has undeniably lost data in this space. Keurig has lost computers for several custodians, Keurig cannot image computers for some custodians due to physical damage that Keurig can't explain, and Keurig cannot decrypt many custodian computers because it let its access to its decryption database lapse. Those issues affect about half of Keurig's custodians.

So I do want to be clear, however, that we do disagree with Keurig's arguments and their accusations with respect to Treehouse's preservation. And frankly, Keurig is guilty of all of the things that it accuses Treehouse of doing, like failing to issue timely

1

16

2 litigation holds. With that said, as we've been
3 receiving communications from Keurig, as discovery winds
4 down, we have been working in good faith to
5 (indiscernible) their questions and to respond. And
6 what we have said to Keurig is, look, we have just
7 produced 2 million documents in this case, nearly 2
8 million I should say, it's some number over 1.9 million,
9 and if there are categories of documents that you think
10 you asked for that you don't have, then let us know and
11 we'll look into that. That's precisely what we've done
12 with Keurig, we've gone to Keurig and we said here are
13 these RFPs, we think that we are missing these documents
14 that we've asked for and will you produce them, and we
15 had that conversation.

16 We had that conversation about the substance of
17 the production. That is, by and large, a conversation
18 that Keurig has opted not to have with us in favor of
19 making this more procedural argument of, well, we think
20 there should be more documents, generally, therefore,
21 there must be spoliation.

22 Mr. Kay mentioned a number of custodians in
23 particular, we are looking into that, we are responding
24 to him. He mentioned Mr. Lemieux. One of the points we
25 said to Keurig is, okay, you're arguing that Mr. Lemieux

1

17

2 didn't produce certain documents from 2009, well this
3 case was filed in 2014. Keurig has conceded that there
4 is no preservation obligation in 2009, so what's the
5 issue? From our perspective, there isn't one.

6 We did discussion Mr. Spratlin with Keurig last
7 week, we identified a technical issue relating to the
8 review of his documents. Keurig asked us if we could
9 produce additional documents by tomorrow, that's a very
10 tight turnaround, we worked through the weekend, we
11 think we're going to be able to get that done. We're
12 clearly working with them in good faith when we identify
13 a minor technical issue to resolve it and to get them
14 the documents that they've asked for.

15 You had asked Mr. Kay how the new metadata will
16 resolve their concerns, and the answer is that it will
17 not. They are really just trying to shortcut their
18 spoliation arguments by failing to address the substance
19 of the productions in favor of counting documents. And I
20 want to address the ESI order and then I want to go back
21 to this counting documents issue because the information
22 that they claim that they need from Treehouse's
23 production is information that Keurig metadata masks, to
24 use Mr. Kay's phrase.

25 But before I get there, the question before the

1

18

2 Court today is really very narrow and it's what does the
3 ESI order require with respect to the custodian other
4 metadata field. And the answer is simple, nothing, the
5 custodian other field is optional. That's clear from
6 page 22 of the ESI order, that's section 6(I)(4)(h)
7 which I'll just refer to (4)(h) because that's a
8 mouthful, and I just want to talk about the relevance
9 here. It says that the order does not create any
10 obligation to create fields that are not automatically
11 generated by the processing of the ESI. That's precisely
12 what Keurig is asking Treehouse to do, to create a field
13 that doesn't exist in our processing tool. And then as
14 if there were any doubt as to what (4)(h) is requiring,
15 it lists the fields that parties must produce. The
16 Custodian other field is not one of them. So Treehouse
17 had no obligation to even populate this field and
18 Keurig's motion entirely ignored this entire provision
19 of the ESI order. And in its reply and even today,
20 Keurig ignores that (4)(h) lists the required fields and
21 custodian other is not one of them.

22 So we think that this provision alone should
23 dispose of Keurig's motion, and it illustrates why it
24 really should not have been filed in the first place.
25 Because Keurig isn't just arguing today that there's

1

19

2 some, and in its motion that there is some room for
3 interpretation here in the interpretation of the
4 custodian other field, Keurig is arguing that Treehouse
5 violated the ESI order, and that's a very serious
6 accusation. But section (4)(h) makes clear that it's an
7 accusation without merit. And that's not the only
8 provision of the ESI order that is relevant here and
9 that Keurig ignored either entirely or in part.

10

And so as I get to those, I just want to point
11 out for a minute that there are two distinct concepts at
12 play here and Keurig's motion is conflating the two. So
13 first we've got the implication for production purposes,
14 and the parties agreed in this case that they would
15 deduplicate documents for production on a family level.
16 It means you don't need to produce multiple copies of
17 the same email family for multiple custodians if they're
18 duplicates, you just produce one. And that's reflected
19 in the first part of section 9(B) which is at page 25 of
20 the order. And that's really for efficiency in
21 production and efficiency in the review of production.
22 Treehouse did that, Keurig does not dispute that.

23

And then, second, 9(B) continues to address
24 deduplication for metadata purposes. And it states that
25 individual family members, meaning each document, will

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

be hashed separately. And so that distinguishes documents that just look similar from those that, technologically speaking, are actually duplicates. And that's done on a document level. Keurig's motion essentially ignores this second half of 9(B).

The provisions continue, 9(C) discusses the hashing methods the parties should employ for those individual family members, and then 9(D) states that all custodians who are in possession of the deduplicated documents are to be identified in the custodian other field. The reference there is to documents, not families, which makes sense because that hashing is done on a document level. Keurig's motion didn't refer the Court to 9(D) either.

And when we talk about the ESI order, we think it's really important to remember that the ESI order was heavily negotiated by the parties nearly six years ago at this point, and it's been on the docket for almost six years. And the parties were cognizant of the complexity of this case, of the number of parties, of the number of law firms, and of the array of e-discovery tools that they might use. And so the parties expressly rejected imposing the unreasonable burden that Keurig wants the Court to impose now.

The parties rejected the idea that everyone needs to use the same e-discovery tool. The parties rejected the idea that any party would need to procure a new tool or reconfigure its existing tool in order to produce the metadata fields. And in addition to section (4)(h) this is also reflected in appendix 2, which is focused on metadata, and it memorializes these ideas. And the introduction to appendix 2 states that the metadata field listed in that appendix need only be provided to the extent that they are automatically generated using the tools ordinarily employed by a party. Keurig's motion ignored this language, too, but appendix 2 is really instructive here, especially when we talk about Nuix, which I won't get to, I'll wait for Mr. Kay's argument on that.

And then we also need to look at the definition of custodian other, that's in appendix 2. And that field, which again is option, is defined as the name of the person, their locations, in addition to the custodian, from whose file the item may have been deduplicated. So we see that that definition also refers to a single document or an item. Again, the parties negotiated this and they choose to use item, not family. An item means a single document, that's how the parties

1 22

2 use it, that's how Nuix uses it, that's even how
3 Keurig's paid declarant, Mr. Marshall of Encoura
4 Consulting uses items to refer to a single document.

5 So we think it's very clear from all of these
6 provisions that I just walked through that Keurig's
7 motion ignores that this field is to be defined and it's
8 to be populated on the item level. There is no reason to
9 do that except for the fact that these provisions are to
10 the contrary to the argument that they make now, and
11 also contrary to Keurig's own metadata, so let me just
12 touch on that and then I'll wrap up my comments.

13 So I just want to spend a moment on Keurig's
14 metadata because I think it highlights the inconsistency
15 of Keurig's arguments here. And as we discussed in our
16 opposition, I'm specifically talking here about Keurig's
17 metadata with respect to documents it produced from
18 Combalt (phonetic), and this is a central email
19 repository that Keurig maintained and we learned about
20 it in 2018. This is after we approached Keurig because
21 their initial production started out as very clearly
22 deficient and ultimately Keurig admitted that they had
23 failed to collect Combalt emails. Combalt is where
24 Keurig stores emails for employees under litigation
25 holds and that necessitated delaying the discovery

1

23

2 schedule by about six months to let Keurig, to give
3 certain time to collect the emails, produce the emails.

4

What we learned in 2019, so the year after
5 that, is that when a user's emails are added to Combalt,
6 Combalt doesn't retain custodian metadata. So rather
7 than acknowledging that and populating its custodian
8 information as custodian Combalt or as custodian Keurig,
9 which is the name Keurig uses to denote documents
10 produced from all of its other centralized repositories,
11 Keurig decided instead that if the custodian is in the
12 to, the from, the cc field of a document, then they
13 should be listed as a custodian of that document. But
14 that ignores that Combalt only contains emails for a
15 given Keurig employee if that employee's mailbox was
16 added to Combalt by Keurig's IT Staff. And even then,
17 it's only as of the date that Combalt was activated.

18

So Keurig has told us that employee emails were
19 generally added to Combalt at the time they got a
20 litigation hold. They didn't keep records of when that
21 occurred, but that's what they think happened. So that
22 means that if a Keurig employee joined Keurig in 2012
23 and got a litigation hold for this case in let's say
24 2016, the earliest date any of their emails, that
25 custodian's emails would be in Combalt is 2016. So

1
2 Keurig's metadata ignores that.

3 So let's say that Keurig produced an email from
4 Combalt dated 2015, and that email was two custodians in
5 the cc field. Custodian 1 had their documents added to
6 Combalt in 2014, so this March, 2015, is their copy, so
7 it's from their files. But the second custodian is the
8 one from my last example. So this person wasn't added to
9 Combalt until 2016. So this isn't their custodian
10 email, and Keurig actually has no idea if custodian
11 number 2 preserved the email. They may have deleted that
12 email in 2015 right after they read it and, if so, it's
13 not their custodian document at the time of collection.
14 But Keurig's metadata masks that fact and obscures that
15 fact because Keurig lists both custodian number 1 who
16 was added to Combalt and custodian number 2 who was not
17 added to Combalt and may have, in fact, deleted this
18 document as a custodian or owner of the document.

19 And the end result of that is that it's
20 impossible for us to count the number of documents
21 produced from the files of any of Keurig's custodians.
22 Or in the words of Keurig's declarant, Mr. Marshall, it
23 means that Keurig's metadata obscured who owned the
24 document at the time of collection. And in response to
25 that, Keurig has said it doesn't matter. They say

1

25

2 whether a particular Keurig custodian actually preserved
3 or deleted an email in Combalt is irrelevant. Well if
4 that's true for Keurig, it's true for Treehouse, there's
5 no reason to treat the parties differently just because
6 Keurig obscured the source of its emails in this way.
7 And Keurig hasn't disputed to us the inconsistency of
8 its argument, instead they said a couple of things. They
9 said, well maybe you ended up getting more documents
10 from Combalt, I don't know if that's true and really
11 neither do they, because they didn't keep track of which
12 custodians were added to Combalt and when.

13

And the other thing they said is, well, we
14 think you agreed that we could obscure the source of our
15 emails in this way, and that is not true. We did not
16 agree that Keurig could make its initial custodian
17 assignments in this way, nor could we have because
18 Keurig didn't disclose that to us until 2019, the year
19 after we initially discussed Combalt.

20

So with respect to Combalt and with respect to
21 the motion that is currently before the Court, we think
22 that it would be very inequitable to allow Keurig to
23 continue to make this argument about the deficiency of
24 Treehouse's production on the number of documents
25 produced from a custodian's files because Keurig's

1

26

2 production metadata makes it impossible for us to assess
3 those numbers for Keurig's custodians. And we think the
4 Court would be justified in ordering Keurig to reproduce
5 metadata for its Combalt documents as custodian Combalt
6 as discussed in our opposition, or as custodian Keurig
7 which would be consistent with Keurig's other production
8 from its central repository.

9 So I'll stop there, Your Honor, if you have
10 questions or if Mr. Rosenthal has anything he wanted to
11 add, my other comments are going to relate to Nuix in
12 response to Mr. Kay's argument.

13 THE COURT: Okay, Mr. Rosenthal, anything you
14 wish to add?

15 MR. ROSENTHAL: No. No, I think my colleague
16 covered it all.

17 THE COURT: Okay.

18 MR. ROSENTHAL: I know you may have some
19 technical questions when we get to Nuix, I'm happy to
20 answer those.

21 THE COURT: Okay, thank you. Mr. Kay, can you
22 move to your points about whether Nuix can do what it is
23 you are asking the Court to order Treehouse to do?

24 MR. KAY: Yes, Your Honor. So we think it can,
25 we submitted a declaration from Mr. Mahoney who spoke

1
2 with Nuix and they confirmed that the program was
3 capable of generating a custodian other field, populate
4 it at the family level. You know, we also submitted a
5 declaration from Mr. Marshall who has experience using
6 Nuix and, you know, works at a preeminent e-discovery
7 vendor, and his declaration confirms that, you know,
8 production of custodian other field or (indiscernible)
9 custodian field on the family level is standard practice
10 when documents are deduplicated at the family level, as
11 has (indiscernible) and is beautifully done here.

12 He also submitted, you know, a statement that
13 Nuix is capable of doing it. Treehouse says that they
14 are using a five year old version of Nuix to process the
15 data. They haven't gone so far as to say they're still
16 using that five year old version of Nuix. But even
17 assuming that they are, you know, Nuix has the
18 capability to do it and Mr. Rosenthal doesn't claim
19 otherwise in his declaration. They solely claim that
20 it's not a built-in function. And it's fairly common,
21 as Mr. Marshall says in his declaration, for e-discovery
22 tools to have to be supplemented, and here a proper
23 field could be produced using either of two programming
24 languages, a script, that a basic user of the script
25 could produce. That doing so would not be burdensome and

1
2 that that's common practice to have to produce scripts
3 like that.

4 You know, Treehouse's main argument appears to
5 be that they don't know what will happen if it tries to
6 correct a field, but it doesn't actually claim that it
7 made any effort to try. And the risks it identifies
8 with respect to the database could be eliminated by
9 making a simple backup of its database, which it should
10 be doing in the ordinary course anyway. So Keurig's
11 view is that Treehouse shouldn't be permitted to avoid
12 correcting its metadata field simply because, you know,
13 it closes its eyes and then says it can't see a
14 solution.

15 THE COURT: This is a question for Mr. Mahoney
16 or Mr. Marshall, whoever prefers to answer, what are the
17 depths that would be involved of having the Nuix
18 regenerate the additional metadata? It sounds like
19 there's some code that needs to be written and
20 implemented and then what, and how much time would it
21 take?

22 MR. MAHONEY: Yes, this is Mr. Mahoney. There
23 is some code that would either need to be written or
24 provided by a vendor or someone like Nuix. It's
25 relatively simple code that would go back to the

1
2 original unduplicated population and its metadata, would
3 pull certain data points from that metadata and
4 (indiscernible) that it generated, that it combined
5 document level hatches to create a family level hatch,
6 and then populated the custodian value on the standing
7 (indiscernible).

8 It's a pretty simple process. It's, according
9 to our expert, pretty easy code to write. And once
10 written, that code may test database, you would make
11 sure it's populating, okay, to create a new field rather
12 than overwriting and existing. And that would mitigate
13 any risk of corruption and would require relatively
14 little work.

15 THE COURT: So would this be, it would not be
16 replacing the custodian other field, it's creating some
17 other field as a result of writing and implementing this
18 new code and then deploying it?

19 MR. MAHONEY: So in the processing database, the
20 way you would implement it is to create a new field and
21 not to overwrite the existing field. And this is just
22 something done in case there's any issues. If there's
23 any issues that in writing the script you haven't
24 corrupted and existing field, you just have a new field
25 that you work with. But in providing the overlay to

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

Keurig, it would then be provided as a replacement.

THE COURT: And on a population of about 2 million documents as we have here, how long would that process take?

MR. MAHONEY: Not long. As an automated script it would run for several hours. It would take more time to develop the script than to run it. But such scripts are already in existence and it actually wouldn't take that much time to write either.

THE COURT: Ms. Lanski, do you have a response?

MR. ROSENTHAL: Good afternoon, Your Honor, it's John Rosenthal. So, yeah, I'm at a loss as to why we're even here. There's a reason why there's a provision written in the ESI order which the parties agreed to and are bound by which says that we don't have to go out and create software and jump through hoops because it's not reasonable and it's not practical. What Mr. Mahoney said is almost fantastical and I can tell you he's not a software engineer, he's not done this himself and, frankly, doesn't know how to do this.

The reality is we are using a system that we have two ISO, 27,000 certified data centers in which we have over 300 terabytes of production data and culling data, where we have a Nuix installation that is tested,

1
2 retested, and secure and running across multiple cases.
3 What he wants us to do is go in, in the current
4 circumstances where we're operating remotely, pull out
5 our software, create a development environment, test the
6 script, the develop the script, then validate the
7 script, and then repopulate that across this dataset.

8 So we're going to be pulling our Nuix system
9 out of operations so we can try and design these scripts
10 for information that we are not required to do under the
11 express terms of the ESI order. And frankly, we have not
12 done in over the 2,000 or 3,000 cases where we've used
13 this Nuix system over the last, since 2011. And their
14 proposition that this is industry standard is
15 fantastical. Different engines, different versions of
16 engines do this different ways and that's just the
17 reality here.

18 They have the information they need, they have
19 access to all the documents, the documents got produced.
20 This is just a fishing expedition and, you know, this is
21 not some, yes, Nuix created the script. It created a
22 script not designed for this version of Nuix. So you're
23 asking us to take a script we didn't draft, put it into
24 our system, try and make it operate, make sure it
25 doesn't corrupt either this database or any other

1

32

2 database or disrupt their environment. And then rerun
3 these fields or fields that we're not required to run
4 under the express terms of the order.

5 So, you know, the reality is that the order
6 calls for family level deduplication, they agreed to
7 that, that's what they got. The order then provides
8 that we have to provide an other custodian field. Now
9 we provided that. I'm sorry they don't agree with how
10 that's defined and how we've done that since 2011, and
11 how many vendors do that across the United States, but
12 that's just the reality. And here they haven't pointed
13 to anything specifically in this field that is causing
14 them an issue other than their speculation that they
15 believe that there is some kind of a document issue here
16 which they have not articulated any proof of. And now
17 they want us to go in and reengineer our system with
18 some untested script that's going to put at risk our
19 system and this database, I just don't see how that's
20 warranted under the circumstances and under the express
21 terms of the order. Which make it abundantly clear under
22 that section that we are not required to go generate
23 metadata fields or information that do not exist. And,
24 in fact, the parties expressly negotiated those fields
25 that they would have to go out there and create if they

1
2 did not exist, and this clearly is not one of them, and
3 for good reason.

4 THE COURT: Mr. Kay or Mr. Mahoney, anything
5 you'd like to say?

6 MR. KAY: Yes, Your Honor, if I could just
7 respond to a couple of the points that Ms. Lanski and
8 Mr. Rosenthal made. You know, they cited, Ms. Lanski on
9 her opening cited a number of provisions of the ESI
10 order that she claims we ignored and that made clear
11 that this field is not required, custodian other field.
12 I mean they're all sort of red herrings.

13 The deduplication isn't actually required under
14 the order. It's optional, everyone does it because it's
15 efficient. But when you produce, you know, when you do
16 deduplicate, the order is very clear in 4(D) that you
17 have to produce, in 9(D), apologies, that you have to
18 produce a custodian other field. The fact that it's not
19 listed in (4)(h) is totally consistent with that. I mean
20 that field actually expressly references paper
21 documents. And what it's saying is that if you produce a
22 paper document from a source, the fact that the paper
23 document doesn't have metadata associated with it,
24 doesn't mean that you don't have to produce a custodian
25 field for the paper document. But when you produce,

1
2 when you do deduplicate, the order requires in 9(D) that
3 you produce the custodian other field in the section
4 called deduplication and in the section that describes
5 the deduplication can only be done on the family level.

6 You know, Mr. Rosenthal and Ms. Lanski both
7 accuse Keurig of conflating that deduplication and the
8 custodian other fields. I mean they are clearly linked
9 in the order because the word deduplicate is used in
10 paragraph 9(D) that's defining the custodian other
11 metadata. And then Ms. Lanski cited to appendix 2 and
12 the definition of custodian other in appendix 2, and Ms.
13 Lanski said that we ignored in appendix 2 that the
14 custodian other field references that it has to identify
15 the name of persons and locations from whose files the
16 item may have been deduplicated. She puts a lot of
17 weight on items, but the custodian other field has to be
18 populated for each document, each item that's produced.
19 That doesn't say anything about how the value is
20 supposed to be calculated.

21 So the fact that you have to produce a
22 custodian other field for every single item that is
23 produced doesn't mean that you can produce that value to
24 reflect document level duplicates. Our position is that
25 the rest of the order makes very clear that you have to

1
2 produce that field on a family level.

3 And then with respect to Mr. Rosenthal's claim
4 that our request for this data is fantastical, you know,
5 we have two declarations that say that it's not. Mr.
6 Marshall, you know, says that it's common practice to
7 write a script like this. Mr. Rosenthal is
8 mischaracterizing our position a little bit in claiming
9 that we have to, we're asking them to install a version
10 7 script, you know, into their database.

11 You know, we were pointing out that Nuix makes
12 the sort of script that does this available publicly
13 online for free. And Treehouse, you know, in everything
14 they've said today they haven't claimed once that they
15 spoke with Nuix about how to do this. You know, they
16 haven't made any representations that they tried to
17 accomplish this at all. They just keep saying that it's
18 impossible in Version 6.2 of Nuix. And they haven't
19 made a representation that they're still using Version
20 6.2 of Nuix. Mr. Marshall's declaration, you know,
21 notes that later versions of Nuix actually have this
22 feature built in. And so if Treehouse isn't still using
23 Version 6.2 of Nuix, they may not even need to do, may
24 not even write a basic script that, you know, it's
25 common practice for e-discovery vendors who do this

1
2 professionally to write. And so, you know, I don't even
3 know if they need to write this script.

4 And then, Your Honor, just to respond to Ms.
5 Lanski's points on Combalt, you know, it's really just a
6 distraction from the issue here. There are a number of
7 reasons why their arguments aren't persuasive, but most
8 importantly, the Combalt emails that we produced were
9 actually sent overseas by the custodian that's indicated
10 in the field. They are fairly characterized as custodian
11 files. Treehouse's custodian other field populates
12 custodian values on documents that the custodian
13 indisputably never received.

14 And the second point is that each email that we
15 produced from Combalt was collected and produced because
16 it was sent or received by a particular custodian. So
17 the custodian field reflects the reason that Treehouse
18 received the email, it was sent or received by that
19 custodian.

20 So if Treehouse wants to, you know, populate
21 with a Combalt field to reflect it's coming from
22 Combalt, but, you know, Treehouse also produced emails
23 from Enterprise Vault and didn't, you know, their own
24 email archive, and didn't identify any custodial field
25 that they came from and emailed back up on Enterprise

1
2 Vault as opposed to from the custodian's mailbox. I
3 mean the custodian field doesn't mean that it came from
4 the mailbox, it means that it came from a particular
5 custodian.

6 And then, you know, if I can just make one more
7 point about prejudice, about where Keurig needs this
8 field. Ms. Lanski suggested that this is a minor
9 technical issue and that Keurig is fishing for
10 information, this is totally wrong. It's an important
11 data field. It's required in, you know, in standard
12 practice, in litigation to permit deduplication, which
13 now is standard practice in litigation. All the other
14 parties complied with the ESI order and listed
15 deduplicated documents as the order requires. Because
16 Keurig complied, you know, Treehouse has an easy time,
17 you know, spotting issues in Keurig's production to the
18 extent they exist, but Treehouse inflated its counts in
19 a way that makes it hard to spot problems.

20 And just to put a practical point on this, you
21 know, there are two, Your Honor, with the Lemieux
22 example there are actually 23,000 documents that are
23 listed as Lemieux custodian documents, 22,500 of them he
24 never received. That's more than the total volume of Mr.
25 Rathers' productions that Treehouse claims it produced

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

which in itself is inflated. So it's a total custodian production of, you know, of custodian other metadata that doesn't actually reflect that documents came from the particular custodian at issue.

And those are spread out over time. So if you look at the Lemieux production using custodian other metadata, you know, it looks like they produced approximately 8,000 documents from Mr. Lemieux over the period between 2009 to 2013, they actually produced 600. Mr. Lemieux, you know, essentially led the single-serve beverages business at Treehouse, (indiscernible) in particular, from 2009 to 2013. The fact that they only had 600 emails from his custody is actually significant. And Treehouse's field masked that issue.

If we get the metadata corrected now we can, Treehouse won't be able to make claims that disagree with the number of documents actually produced from custodians. They won't be able to dispute that number because the parties will be able to just cue a search, it will take a couple of seconds and we'll know the number. Right now Keurig has to go through and, it's a burdensome process, we have it replicated for every custodian, and then it involves, you know, actually weeks or months of discussion with Treehouse which none

1 39

2 of them have gone anywhere, just to try to come up with
3 a field that the parties should be able to agree and,
4 cue and agree on in a couple of seconds.

5 So that I think is, that's the prejudice that
6 we're suffering here. You know, we just want to get the
7 field, we don't think it's going to take, it will take
8 much work to actually generate the field. Mr. Mahoney
9 mentioned it would take a couple of hours to write a
10 script. They may not need to even write the script
11 depending on what version of Nuix they have. And we can
12 resolve any remaining problems with litigation.

13 You know, I think Mr. Rosenthal said that we
14 don't have any evidence that there are problems in
15 Treehouse's productions and we're just fishing. But,
16 Your Honor, they've conceded that a dozen custodians
17 didn't receive litigation holds and it's really just a
18 question of prejudice and this is going to impeded the
19 ability to discuss that prejudice.

20 THE COURT: Okay.

21 MS. LANSKI: Your Honor, can I just respond to
22 a couple of the points, just to correct a couple of
23 inaccuracies.

24 THE COURT: Go ahead.

25 MS. LANSKI: Thank you. So very quickly here,

1

40

2 I don't really think that what Mr. Kay has said has
3 really materially altered anything that we've said, but
4 I do want to point out a couple of things that I don't
5 believe are correct. First, he said that (4)(h) relates
6 to paper documents, that's not accurate. Section (4)(h)
7 of the ESI order states that it relates to production of
8 ESI, category (4), so the (4) or (4)(h) is production of
9 ESI, that's clear on page 21 of the order.

10 Again, Mr. Kay is conflating production versus
11 metadata in terms of deduplication. And with respect to
12 the arguments more generally, I think the fact that
13 Keurig felt the need to go higher than third party
14 consultant to go beyond the ESI order and also to go out
15 and search the internet to find new software, makes
16 clear how their request is not proportional. And it
17 concerns our claim which is that this functionality is
18 not part of Nuix, it's not part of the tool that has
19 been ordinarily employed by us.

20 Mr. Kay suggests that we're obscuring from the
21 Court that maybe we're not using Version 6.2, we are
22 still using Nuix Version 6.2. And the risks that Mr.
23 Rosenthal described are very clear, and we have talked
24 to Nuix and they can't confirm to us that devising the
25 script or using the script that Keurig identified on its

1
2 website would be able to run successfully across our
3 database and give Keurig this information they think
4 they need, or that it wouldn't corrupt the database or
5 alter the functionality of the database. That is, in
6 fact, the reason why, as I understand from our e-
7 discovery team, we are still using Version 6.2. Because
8 even upgrading a database of this size or this
9 complexity runs the risk of corrupting it. We need
10 access to our documents and we demand that we alter the
11 database, that we create new software, that we apply
12 that new software, is outside the scope of the ESI
13 order, it's beyond what the parties negotiated they
14 would do. And the bottom line is that this is not a
15 required field. The custodian other field is not
16 required.

17 The last point I want to make is just with
18 respect to Combalt. Keurig says well Combalt emails,
19 our custodian information reflects that custodians sent
20 or received those emails, but as Keurig's declarant, Mr.
21 Marshall makes clear, the question is who is the owner
22 of those emails or of those documents. And so Keurig
23 can't represent that any of its Combalt emails were
24 actually preserved by any Keurig custodian or which one
25 preserved them.

1
2 In contrast, our email archive does preserve
3 custodian data. I have explained this to Keurig, I'm not
4 sure why Mr. Kay represented that we are aligned with
5 Combalt here, but it's not accurate. So, you know,
6 along with all of the other points that we've made, we
7 think that there is no merit to Keurig's motion, we
8 think that their request is not proportional, especially
9 in light of the plain language of several provisions of
10 the ESI order that make clear that this field does not
11 require. But that even if it is required we have
12 populated it in accordance with how our e-discovery tool
13 populates this information and in accordance with the
14 plain language of the definition, which all refer to
15 that order, to that field, rather, on the item or the
16 document level. Thank you, Your Honor.

17 THE COURT: Okay, thank you. If there's nothing
18 further from the parties, I am going to take just a
19 little bit of time to consider the arguments that the
20 parties have made and we will issue a brief order
21 hopefully this afternoon, if not, tomorrow. And then as
22 I said at the beginning, just as a reminder, we need a
23 request in writing from the parties within five days if
24 they want to preserve this recording or have it
25 transcribed. Anything further from the parties today?

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

MR. KAY: Thank you, Your Honor. If I could just make one point, Ms. Lanski referenced that she spoke with Nuix, Nuix didn't put in a declaration for that. And, you know, Nuix just said they weren't sure, the script did help it work in the earlier version, she didn't say that (indiscernible) solution, I would just like to make that clear. But other than that, nothing further from us, Your Honor.

THE COURT: Okay. All right, thank you very much, we're adjourned and keep an eye out for a written order from the Court.

MS. LANSKI: Thank you, Your Honor.

(Whereupon the matter is adjourned.)

C E R T I F I C A T E

I, Carole Ludwig, certify that the foregoing transcript of proceedings in the United States District Court, Southern District of New York, In re: Keurig Green Mountain Single-Serve Coffee Antitrust Litigation, Docket #14md2542, was prepared using PC-based transcription software and is a true and accurate record of the proceedings.

Signature _____

Carole Ludwig

Date: April 28, 2020